

Honorable J Richard Creatura

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

NATHEN BARTON,

Plaintiff

v.

JOE DELFGAUW, XANADU  
MARKETING INC., EXPERIAN  
INFORMATION SOLUTIONS INC.,  
STARTER HOME INVESTING INC, &  
JOHN DOE 1-10  
Defendant(s).

CASE NO. **3:21-cv-05610-JRC**

BARTON'S MOTION TO TAKE  
JUDICIAL NOTICE OF  
DELFGAUW'S STATEMENTS ON  
VALIDIFORM.COM

NOTE ON MOTION CALENDAR:  
Jan 7, 2022

PLEASE TAKE NOTICE that Plaintiff Nathen Barton (hereinafter referred to as "Barton") moves pursuant to Fed.R.Evid. 201 for an Order taking judicial notice of the fact that Defendant Joe Delfgauw is Founder and CEO of the website [Validiform.com](https://Validiform.com), and through this website he has published statements relevant to this litigation.

Delfgauw is also President of Xanadu Marketing Inc. ("Xanadu") and Starter Home Investing Inc. ("Starter Home") so these statements are also relevant to these defendants.

## I. INTRODUCTION

The TCPA generally makes it illegal to solicit consumers without consent. If a telemarketer is challenged, the burden of proof rests on the telemarketer to prove they had consent and the TCPA is a strict liability statute – it is not a defense under the TCPA that a caller *intended* to call someone who consented if they accidentally or negligently called a party who did not consent.

Some businesses operate websites that collect names and phone numbers where consumers can “opt in” to receive telephone solicitations. Consumers who “opt in” become a ‘lead’ for telemarketing purposes<sup>1</sup>. Given that there can be a high degree of anonymity between who is entering information into ‘lead generation’ website and the website operator, it is well known to the Defendants that a prudent and responsible lead generation website operator will use information technology and a third-party verification service to weed out erroneous, fraudulent, and malicious ‘opt ins’.

It is well known to the Defendants because not only is Delfguaw President of Xanadu and Starter Home, but he is also the founder and CEO of *Validiform.com* (“Validiform”), a Third Party Verification Service (“TPVS”). Delfguaw through Validiform<sup>2</sup> publishes a great deal of information relevant to this litigation:

**“What websites need lead certification?”**

Any website that collects personal information for use in electronic or telecommunication is subject to certain regulations about being able to prove the user gave consent for the website owner to do so. Validiform is designed to be a clearcut protection for fraudulent claims of these violations.”

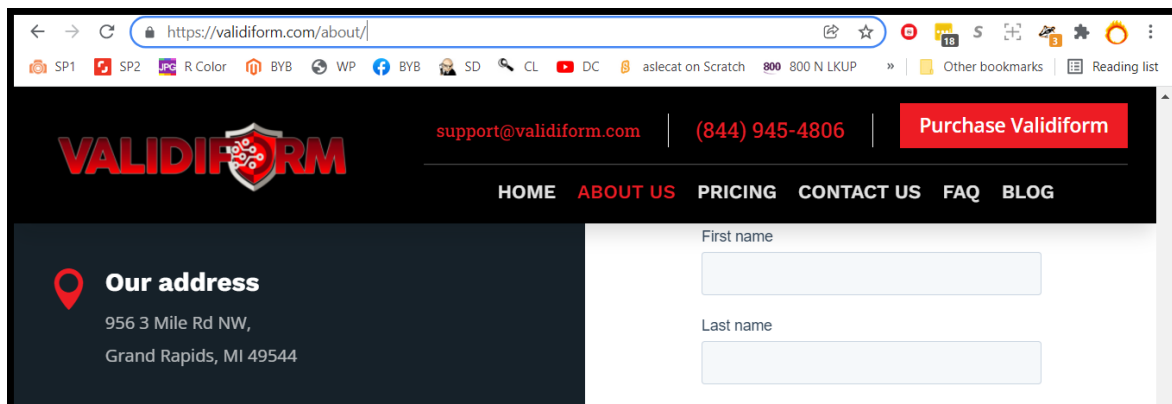
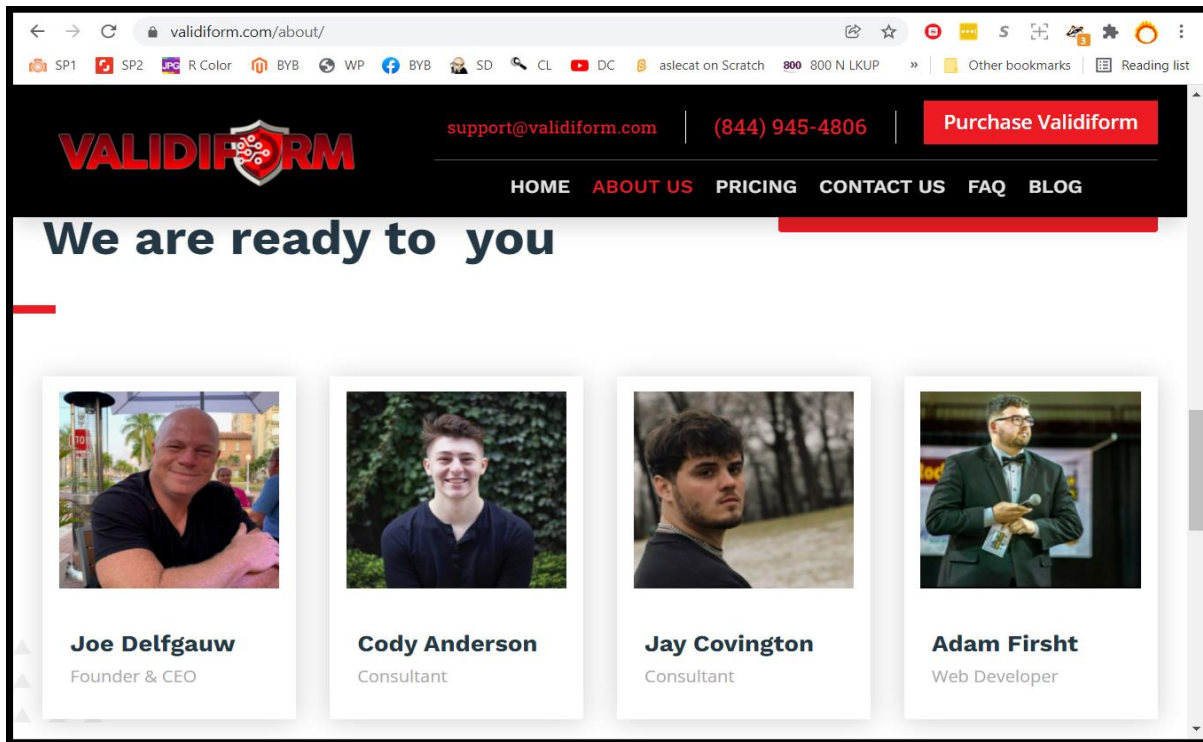
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<sup>1</sup> <https://www.consumer.ftc.gov/blog/2016/09/how-did-company-get-my-info>

<sup>2</sup> <https://validiform.com/faq/>

## How do we know Delfgaww is the founder and CEO of Validiform.com?

We know because Delfgaww tells us. And it isn't mistaken identity because Validiform lists the address<sup>3</sup> of 956 3 Mile Rd NW, Grand Rapids MI 49544 which is the address Delfgaww listed in his Answer to this litigation (Dkt. 20). CEO might be more of a working title as Validiform has a Michigan address but is not a registered in the State of Michigan<sup>4</sup>.



<sup>3</sup> <https://validiform.com/about/>

<sup>4</sup> No business entity starting with "Validif" is registered with <https://cofs.lara.state.mi.us/SearchApi/Search/Search>

Delfgauw's published statements are relevant to this litigation because

1. They tend to prove Delfgauw knew that fraudulent "opt ins" are a widespread issue in the lead generation business.
2. They tend to prove that Delfgauw knew that a responsible lead generator would use CAPTCHA or ReCAPTCHA to prevent fraudulent "opt ins".
3. They tend to prove that Delfgauw knew telemarketing a consumer because of a fraudulent "opt in" could be judged as willfully and knowingly violation of the TCPA.
4. They tend to prove that Delfgauw knew he bore the burden of proving he and his businesses had valid consent to telephone solicit Barton.
5. They tend to prove Delfgauw knows that proof Barton consented to telemarketing from Delfgauw and his companies should come from a third party and not Delfgauw.

#### **What does Delfgauw know about TCPA Consent Requirements?**

In Delfgauw's own words:

"If you're doing any sort of automated outbound marketing by phone or text message, you're subject to be compliant with the Telephone Consumer Protection Act (TCPA).

This essentially means that it's your legal responsibility to be sure that all of your contacts are up-to-date and that they have explicitly given you permission to call or text them with your marketing efforts.

It's crucial that you have validated, archived proof of consent to stay compliant with the TCPA, or they can slap you with a fine of up to \$1,500 per call for violation. That's a high price to pay for one ill-placed phone call."<sup>5</sup>

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<sup>5</sup> <https://validiform.com/why-you-need-a-lead-validation-process/>

1 “Validiform is a cutting-edge lead certification software that tracks a user’s experience on  
2 your website and captures a video when they fill out a web form.”<sup>6</sup>

3 “Additionally, if you’re using any sort of autodialer or SMS marketing, you can get  
4 slapped with fines of up to \$1,500 per call or text if you’re in violation of the Telephone  
Consumer Protection Act (TCPA).

5 We’re going to show you without a shadow of a doubt why Validiform is a necessary tool  
6 for your business’s lead validation process”<sup>7</sup>

7 “TCPA SMS rules are serious, and you need to adhere to them. We’re not attorneys, so if  
8 you have any in-depth questions, you can do further research, but the general idea is that  
9 to be TCPA compliant you are required to have the express written consent from a  
customer to contact them via text message (or autodialer). As you can imagine, this is not  
a simple task.

10 One of the most important things to remember is that this consent must be written, and  
11 documented, and you need to be able to find it if you need it. The TCPA doesn’t mince  
12 words– it states clearly that the burden of proof rests solely on you, the advertiser. If you  
13 can’t provide proof of consent, you’re all but guaranteed to be hit with those hefty fines  
we talked about above. (Also note that people often opt into things and forget, so you  
may even get complaints from people who you legitimately had the right to contact.)”<sup>8</sup>

14 “If you don’t follow the policies set in place by the TCPA and don’t have client consent  
15 before contacting them, you can face legal repercussions that can be very serious, and  
16 expensive. Violations can result in fines that start at \$500 dollars, and can climb up to  
\$1500 dollars per illicit text.”<sup>9</sup>

17 Delfgauw’s published statements demonstrate he knew telemarketing a consumer  
18 because of a fraudulent “opt in” could be judged as willfully and knowingly violation of the  
19 TCPA.

### 20 **What does Delfgauw know about ‘Lead’ Fraud?**

21  
22 <sup>6</sup> <https://validiform.com/why-you-need-a-lead-validation-process/>

23 <sup>7</sup> <https://validiform.com/video-based-user-session-recording-for-validating-website-leads/>

24 <sup>8</sup> <https://validiform.com/brands-marketers-advertisers-how-to-safely-stay-ahead-with-sms/>

<sup>9</sup> <https://validiform.com/what-is-tcpa-and-why-does-it-matter-to-you/>

1 In Delfgauw's own words:

2 "It's sad, but there are people out there who are going to try use form spamming to rip  
3 you off as an affiliate marketer.

4 The way they do this is with bots that are programmed to find lead forms on web pages  
5 and fill them out. This triggers a "conversion" for them as an affiliate, which technically  
6 means you owe them revenue for it.

7 The issue is the conversion isn't legitimate, so if you pay out on this conversion, you're  
8 essentially just giving money away to a fraudster that cheated you.

9 But it can get way worse— and can be much more expensive. See, the form spammers are  
10 getting more sophisticated, and the bots they're using are advanced enough to fill in real  
11 names, real phone numbers, and real email addresses.

12 Since these form fills look legitimate, you'll likely reach out to these people since (as far  
13 as you know) they showed interest. The problem is, a bot filled out your form with their  
14 information, and they have no earthly idea who you are.

15 If you contact them with an offer without their permission, you're now in violation of  
16 TCPA regulations and can face up to \$1,500 in fines if the person files a complaint.

17 You need a way to protect your affiliate marketing efforts against form spamming, or it  
18 could end up costing you a lot of money.”<sup>10</sup>

19 “It's a sad fact, but every form of digital marketing is susceptible to some type of fraud.  
20 Where it can be especially dangerous and expensive is in the lead acquisition space.”<sup>11</sup>

21 “A spambot is a malicious piece of software that is built to crawl your website and find  
22 specific code, and interact with it, pretending to be human for fraudulent purposes.  
23 Spambots can do a number of things, including leaving fake comments, creating fake  
24 accounts, and executing fake email sign-ups, among many other things.

Many Spambots are programmed exclusively to perform fake sign-ups.

Since these tasks often only require the user to fill out a few fields, the Spambots are  
programmed to do this automatically. Sometimes these Spambots are coded to invent  
entirely new, fictional user information— but sometimes they're loaded with real (often

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<sup>10</sup> <https://validiform.com/attempts-at-defrauding-sites-via-form-spamming/>

<sup>11</sup> <https://validiform.com/video-based-user-session-recording-for-validating-website-leads/>

1 stolen) information. Some Spambots are so sophisticated that they model human behavior  
2 before taking action so they're more difficult to detect.

3 Spambots are never good, but if they're loaded with stolen, real information to execute  
4 fake sign-ups it can be especially bad. If you try to send messages to these people, they'll  
5 have no idea who you are, and in almost every case, you'll be breaking the law because  
6 you don't have true consent to contact them."<sup>12</sup>

7 "It begins when a bad actor signs up for your affiliate program. They often already have  
8 access to illicitly obtained customer data at this point. This is stolen customer information  
9 they've typically purchased from a prohibited source like the dark web or illegal  
10 information brokers. These bad actors then use Spambots to automate the signup process  
11 and use the stolen information to execute a wave of fake sign-ups en masse.

12 Unless you catch these fake sign-ups quickly and accurately, you then pay out the  
13 affiliate referral fee on false information. You think you've gotten a bunch of real sign-  
14 ups, but you haven't. So while you're jumping up and down in excitement, a fraudster is  
15 taking your money and disappearing. You'll not only lose money but to make it even  
16 worse, now your database is also tainted with a wave of fake customer data."<sup>13</sup>

17 Delfgaw's published statements show he knew that fraudulent "opt ins" are a  
18 widespread issue in the lead generation business.

### 19 **What does Delfgaw know about how to Prevent Lead Fraud**

20 In Delfgaw's own words:

#### 21 **"How to Protect Against Form Spam**

22 Good 'Ol CAPTCHA

23 You've likely heard of CAPTCHA (or at the very least, had to fill one out). They're  
24 essentially puzzles that are crafted so that only humans can solve them. They work by  
25 requiring inputs that bots can't do easily or accurately.

26 CAPTCHA is a type of tool, not a single brand, so there are various kinds of CAPTCHA  
27 solutions available that all attempt to vex and confound bots.

28 <sup>12</sup> <https://validiform.com/how-to-spot-fake-sign-ups/>

29 <sup>13</sup> <https://validiform.com/how-to-spot-fake-sign-ups/>

1 There are some downsides to CAPTCHA. Firstly, sometimes people are just plain  
 2 annoyed by them because they're an extra step in completing online tasks. Secondly, bots  
 are getting smarter every day, and not all CAPTCHAs are unbeatable.

3 Having a CAPTCHA in place typically can't hurt anything, and can be a good "catch-all"  
 4 for bot traffic protection."<sup>14</sup>

5 "The baseline method for stopping fake signups is the use of the latest version of a  
 6 CAPTCHA (or the more advanced ReCAPTCHA). While these tools aren't perfect,  
 they're a strong complement to some of the more robust solutions we've recommended.  
 7 A CAPTCHA or ReCAPTCHA forces a website's user to interact with the site with  
 specific clicks that can't be faked by Spambots easily. This can be checking a check box,  
 8 or even selecting a group of similar pictures. **Every site should have a CAPTCHA or  
 ReCAPTCHA as its first line of defense against fake signups.**"<sup>15</sup> [emphasis added]

9 Delfgauw's published statements prove that he knew that a responsible lead generator  
 10 would use CAPTCHA or ReCAPTCHA prevent fraudulent "opt ins".

### 11 What does Delfgauw know about the Standard of Proof

12 In Delfgauw's own words:

13 "Don't leave yourself unprotected: have proof of every form fill on your site.

14 How in the world could you do that?

15 It's simple.

16 Validiform is proven software that captures, validates, and saves consent from your  
 17 website's visitors (in a format readable by a human)." <sup>16</sup>

18 "**Third-Party Verification:** If the validity of your leads comes into question at all, our  
 19 proof will act as a third party that is considered impartial. Our process doesn't rely on any  
 vendor-reported information and is independently collected.

20 **Video Capture and Replay:** You'll get a crystal-clear screen recording of users  
 21 interacting with your website. You'll see what they click, the data they enter, and

22  
 23 <sup>14</sup> <https://validiform.com/attempts-at-defrauding-sites-via-form-spamming/>

<sup>15</sup> <https://validiform.com/how-to-spot-fake-sign-ups/>

24 <sup>16</sup> <https://validiform.com/attempts-at-defrauding-sites-via-form-spamming/>



1 anything else they do on screen. This is the gold standard when it comes to proof of  
2 consent that holds weight.”<sup>17</sup>

### 3 **“Validiform is the Standard in TCPA Consent**

4 Validiform captures video evidence that contains all of the user’s actions on your page, as  
5 well as other crucial details to the session. These details include what the consumer was  
6 looking at, what information they put into the form, and when and where the form was  
7 filled out.

8 Using video evidence, our software eliminates any information gaps that could arise from  
9 other forms of proof of consent. Our videos will give the clearest, most irrefutable, and  
10 accurate picture of the situation for all sides involved.

11 Because of the accuracy and clarity of the video evidence Validiform provides, it is  
12 considered by many in the industry the standard in TCPA consent.

### 13 **Don’t Try to Validate Leads Yourself**

14 Even if you can figure out the technical side of the equation (which is no simple matter),  
15 and you can figure out a way to store the data in way you can find it, there is still one  
16 major reason you’ll want to avoid validating leads yourself... the legal implications.

17 **If someone does file a lawsuit against you, it doesn’t look great that your proof is**  
18 **coming from your own in-house sources. Candidly, who’s to say you didn’t doctor**  
19 **the data before presenting it?** If your proof comes from an independent source, it’s  
20 often considered a much stronger piece of evidence.”<sup>18</sup> [some emphasis added]

21 “Finally, make sure that your evidence of consent can prove beyond a shadow of a doubt  
22 that you’re not guilty of the accusation. Unless you’ve figured out a way to take a video  
23 of the screen (like Validiform does), there are holes in your argument for speculation to  
24 occur. Don’t leave gaps that could cost you. If you can’t come up with a video solution,  
you’re putting yourself at risk.”<sup>19</sup>

“If a Spambot uses someone’s real information to sign up, and you contact them, your  
only course of action will be to assume guilt and take the penalty or fine... unless you  
have Validiform.

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<sup>17</sup> <https://validiform.com/video-based-user-session-recording-for-validating-website-leads/>

<sup>18</sup> <https://validiform.com/video-based-user-session-recording-for-validating-website-leads/>

<sup>19</sup> <https://validiform.com/video-based-user-session-recording-for-validating-website-leads/>

Validiform is the industry standard in lead validation that tracks your user's activity on your website and captures video any time someone fills out a web form. We then store that video on our secure servers for you to retrieve at any time.

If there's ever any question of the validity of a sign-up, and you're in danger of a TCPA lawsuit, Validiform can save you from sitting through many hours in court, and from paying thousands in fines. All you have to do is pull up the video of the exact moment the customer opted-in, and you'll be proven innocent by a third-party source.”<sup>20</sup>

Delfgauw's published statements prove that he knew he bore the burden of proving he and his businesses had valid consent to telephone solicit Barton.

Delfgauw's published statements prove he knows that his burden of proof showing he had consent to telemarket Barton requires much more than Delfgauw producing spreadsheets from his own database.

## II. ARGUMENT

“Traditionally, judicial notice has been used to eliminate the need for formal proof by the introduction of evidence of certain matters which either are so universally known and accepted as to be beyond doubt or matters which, while not universally known, are so certain [] as to be beyond doubt.” 60 Am. Jur. Proof of Facts 3d 175 (2001).

A Court may take judicial notice of adjudicative facts that are not subject to reasonable dispute where (1) they are generally known within the Court's territorial jurisdiction; or (2) they can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. See FED. R. EVID. 201(a)-(b).

Delfgauw cannot dispute that his own website makes these statements.

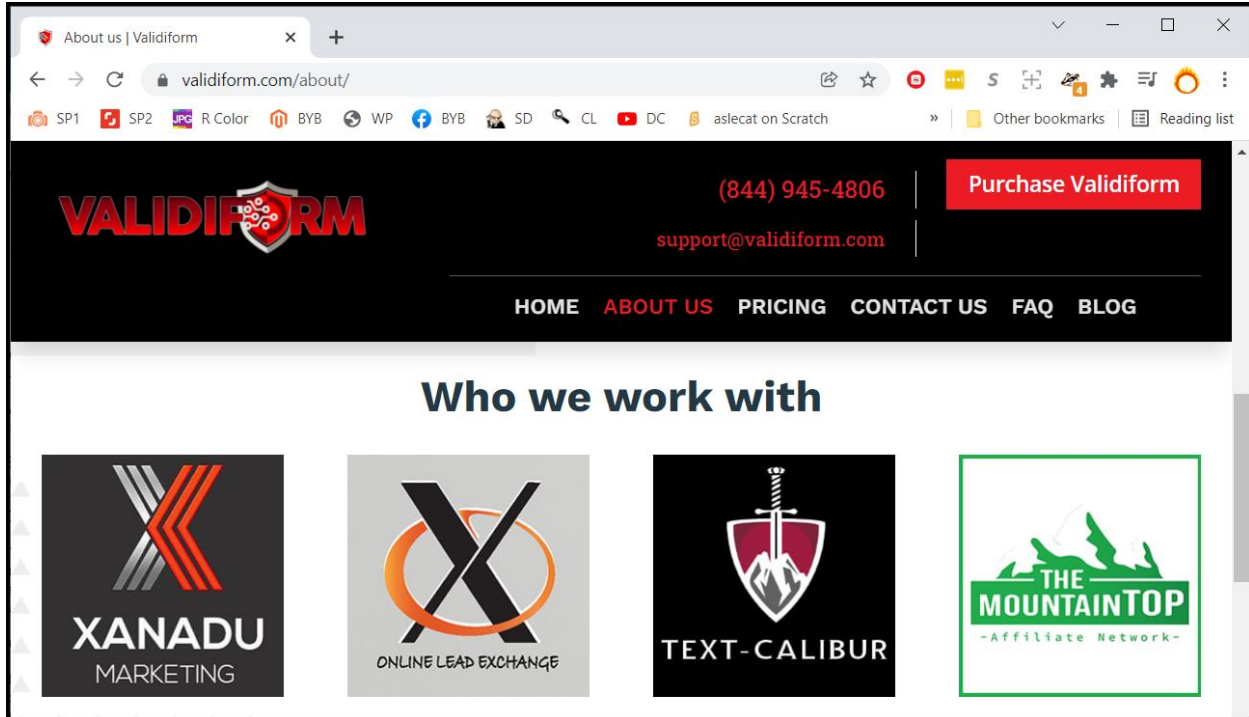
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<sup>20</sup> <https://validiform.com/how-to-spot-fake-sign-ups/>

Thus, this Court is permitted, pursuant to FED. R. EVID. 201, to take judicial notice of these facts. Indeed, a court is required to take judicial notice if requested by a party and supplied with the necessary information. Fed.R.Evid. 201(d).

### III. FURTHER IMPORTANCE

This is also highly relevant because Validiform says they work with Xanadu Marketing<sup>21</sup> (Inc) a defendant in this lawsuit who operates the two websites the Defendants claim Barton “opted in” from, and The Mountaintop Affiliate Network who wrote Delfgaw a letter explaining a loss of income from Tort Experts.



### IV. CONCLUSION

Barton’s motion should be granted, and the Court should take judicial notice that:

<sup>21</sup> <https://validiform.com/about/>

1. Delfgauw made statements that fraudulent “opt ins” are a widespread issue in the lead generation business.

2. Delfgauw made statements that a responsible lead generator would use CAPTCHA or ReCAPTCHA to prevent fraudulent “opt ins”.

3. Delfgauw made statements that telemarketing a consumer because of a fraudulent “opt in” could be judged as willfully and knowingly violation of the TCPA.

4. Delfgauw made statements that he bore the burden of proving he and his businesses had valid consent to telephone solicit Barton.

5. Delfgauw knows made statements that evidence showing Barton consented to telemarketing from Delfgauw and his companies should come from a third party and not Delfgauw.

s/ Nathen Barton  
(signed)

12/22/2021  
(Dated)

Nathen Barton  
(718) 710 5784  
4618 NW 11<sup>th</sup> Cir  
Camas WA 98607

#### CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2021, I caused the foregoing document to be electronically filed with the Clerk of the Court using the Electronic Filing (CM/ECF) system, which will send notification of such filing to all counsel of record and all pro se parties registered to use the CM/ECF system.

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s/ Nathen Barton

Nathen Barton

12/22/2021

(Dated)